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In the

Supreme Court of the United States

BORDEN RANCH PARTNERSHIP;
ANGELO K. TSAKOPOULOS,
Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS;
UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF CALIFORNIA FARM BUREAU FEDERATION, CALIFORNIA CATTLEMEN'S ASSOCIATION, AND PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether deep plowing ranch land to plant deep-rooted crops constitutes the "addition" of a "pollutant" (the plowed soil) from a "point source" (the plow) so as to fall within the regulation of Section 404 of the Clean Water Act.

2. Whether deep plowing ranch land which is farmable in its natural state to plant deep rooted crops is statutorily exempt from regulation under Section 404(f)'s exemption for any discharge from "normal farming . . . activities such as plowing[.]"

3. Whether the Clean Water Act's civil penalty section, authorizing penalties "not to exceed $25,000 per day for each violation," authorizes assessing the maximum daily penalty for each time a plow crosses a seasonal drainage feature, without regard to the number of days when such activity occurred.

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INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.3, the California Farm Bureau Federation, California Cattlemen's Association, and Pacific Legal Foundation respectfully submit this brief amicus curiae in support of Petitioners.[1] Written consent for amici curiae participation in this case was granted by counsel of record for all parties and has been lodged with the Clerk of the Court.

The California Farm Bureau Federation (CFBF) is a nonprofit corporation and is California's largest farm organization. It has 53 county farm bureau affiliates located throughout California through which it represents owners and operators of farms and ranches. CFBF represents approximately 43,000 California farm families who grow over 250 kinds of crops. California Farm Bureau Federation's farm families contribute the majority of agricultural production in California which saw its agricultural marketings reach $27.2 billion in 2000. Many of these families farm on lands that contain the types of seasonally wet ranch land at issue in this case.

The California Cattlemen's Association is a nonprofit corporation that was founded to represent California's beef cattle industry in legislative and regulatory affairs. Beef cattle producers operate on over 38 million of California's 100 million acres and contributed $1.32 billion to the state's

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[1] Pursuant to Supreme Court Rule 37.6, Amici Curiae California Farm Bureau Federation, California Cattlemen's Association, and Pacific Legal Foundation affirm that no counsel for any party in this case authored this brief in whole or in part; furthermore, no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

multi-billion dollar agriculture economy as recently as 1997.[2] The industry provides more than 26,000 jobs from the ranch level to the processing level in the State of California alone.

The California Farm Bureau Federation and California Cattlemen's Association's members conduct their operations on lands that include swales, ditches, vernal pools, and man-made stock ponds and watering holes. These lands, especially in California's Central Valley, are often covered with "hardpan," that is, clay soils through which rainwater does not easily percolate.

Farming and ranching operations, especially small-scale operations, often require changes in crops to take advantage of favorable markets. But changing crops in the Central Valley and elsewhere in California often requires deep plowing so that hardpan or compacted soils will accommodate the irrigation needs of the new crops. Cattlemen and farmers, much like the Petitioners in this case, are increasingly encountering United States Army Corps of Engineers' personnel who assert Clean Water Act section 404 permitting jurisdiction over these plowing activities.

The California Farm Bureau Federation and California Cattlemen's Association believe that the Corps' assertion of jurisdiction over this plowing extends the Corps' jurisdiction far beyond what was intended under the Clean Water Act. The ramifications of Corps jurisdiction are troubling, as they will have severe economic consequences on the state's agricultural industry. Many CFBF and CCA members are deeply concerned they may lose their ability to maintain viable agricultural operations if the normal activity of deep plowing becomes subject to the permitting discretion of federal bureaucrats.

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[2] http://www.calcattlemen.org/aboutcca.htm (last visited Aug. 13, 2002).

Pacific Legal Foundation (PLF) is the largest and most experienced nonprofit public interest law foundation of its kind in America. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. PLF litigates nationwide in state and federal courts with the support of thousands of citizens from coast to coast. PLF is headquartered in Sacramento, California, and has offices in Miami, Florida; Honolulu, Hawaii; Bellevue, Washington; and a liaison office in Anchorage, Alaska.

PLF has participated in numerous cases across the country concerning the interpretation of the Clean Water Act and its restrictions on landowners' rights to use their private property in a reasonable, productive manner. For example, PLF participated as amicus curiae before this Court in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), and before the United States Circuit Court of Appeals in *National Mining Association v. United States Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998). PLF has many members who are ranchers or farmers and PLF's attorneys have represented the agricultural industry on many occasions. PLF believes the decision of the Ninth Circuit in this case may seriously impair the ability of many California farmers and ranchers to make profitable agricultural use of their lands.

STATEMENT OF FACTS

Borden Ranch Partnership acquired an 8,400-acre ranch in the Central Valley of California in 1993. The Partnership's intent was to continue farming and introduce higher value vineyard and orchard crops. Petition for a Writ of Certiorari (Pet.) at 9. The ranch property had been used previously for cattle grazing, irrigated pasture, and growing wheat, hay, alfalfa, and some row crops. *Id.*

However, vineyard and orchard crops could not be grown on some of the land without deep plowing because the soil was too heavily compacted. Deep plowing loosens and mixes—virtually in place—the compacted soil to a depth of four to six feet. It breaks through the hard pan soil to allow the infiltration of irrigation water.[3]

The Corps objected to Borden Ranch's deep plowing in areas the Corps contends contain waters of the United States (seasonal drainage swales).[4] The Corps charged that without a permit, the deep plowing in these areas constitutes a discharge of dredged or fill material prohibited by Section 404 of the

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[3] The Corps describes deep plowing, which it calls deep-ripping, as

> the mechanical manipulation of the soil to break up or pierce highly compacted, impermeable or slowly permeable subsurface soil layers, or other similar kinds of restrictive soil layers. These practices are typically used to break up these subsoil layers (e.g., impermeable soil layer, hardpan) as part of the initial preparation of the soil to establish an agricultural or silvicultural operation. Deep-ripping and related activities are also used in established farming operations to break up highly compacted soil. Although deep-ripping and related activities may be required more than once, the activity is typically not an annual practice. Deep-ripping and related activities are undertaken to improve site drainage and facilitate deep root growth, and often occur to depths greater than 16 inches and, in some cases, exceeding 4 feet below the surface . . . .

Regulatory Guidance Letter No. 96-02, *Applicability of Exemptions Under Section 404(4) to "Deep Ripping" Activities in Wetlands* (Dec. 12, 1996).

[4] Drainage swales are "shallow linear features ranging from several inches to several feet wide, and up to several hundred feet long—which exist and carry stormwater runoff for brief periods only during and after seasonal rains, and which ultimately drain to intermittent streams." Pet. at 6.

Clean Water Act. The lower courts agreed with the Corps. (*See* Pet. at 9-15, for a detailed explanation of the facts in this case.)

SUMMARY OF ARGUMENT

Section 404 of the Clean Water Act, 33 U.S.C. § 1344, authorizes the Corps[5] to require permits for those activities that "discharge" or "add" a pollutant from a "point source" into navigable waters. Section 404 expressly exempts from this permitting requirement "normal farming . . . and ranching activities, such as plowing," which do not convert an area of water into a use to which it was not previously subject. 33 U.S.C. § 1344(f).

The Ninth Circuit's decision conflicts with the express limiting provisions of the statute. Plowing does not involve the discharge of a pollutant from a *point source*. Specifically, a plow is not a *point source*. Also, as explained in *National Mining Association v. United States Army Corps of Engineers*, 145 F.3d at 1404, incidental fallback of dirt into wetlands during dredging activities does not *add* a pollutant to the nation's waters and therefore is not subject to the Corps' section 404 regulation. Deep plowing, like all forms of plowing, does not remove soil from the ground as does dredging. It merely breaks apart compacted soil to allow root penetration and does not even involve fallback, much less incidental fallback. Deep plowing, if anything, *adds* only *air* to the land being plowed which is certainly not a pollutant.

The Ninth Circuit's finding that the Corps has section 404 jurisdiction over deep plowing also contradicts the express exemptions in the 1977 amendments to the Clean Water Act, for normal farming and ranching activities, 33 U.S.C. § 1344(f), the Corps' own regulations, interpreting its jurisdiction, 33

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[5] EPA oversees the Corps' enforcement of Section 404, 33 U.S.C. § 1344(c); 40 C.F.R. pt. 231 (2002).

C.F.R. § 323.4(a)(1)(i) (2002), and legislative history. When Congress amended the Clean Water Act in 1977, it sought to protect the normal agricultural activity of plowing from the costly and often arbitrary section 404 permitting process. In short, the Corps has no jurisdiction under the Clean Water Act to regulate Borden Ranch's plowing, whether it be shallow or deep, because Congress never sought to have the federal government control what crops a farmer may plant.

In summary, the language and legislative history of the 1977 amendments to the Clean Water Act, as well as the narrow physical scope of deep plowing, provide an overwhelming basis for this Court to overturn the Ninth Circuit and reject the Corps' unauthorized exercise of section 404 jurisdiction over plowing.

ARGUMENT

I

THE PLAIN LANGUAGE OF THE 1977 AMENDMENTS TO THE CLEAN WATER ACT SHOWS THAT PLOWING DOES NOT CAUSE A "DISCHARGE" THAT IS SUBJECT TO SECTION 404 REGULATION

The interpretation of section 404 of the Clean Water Act applied by the Corps to Borden Ranch in this case is not a permissible construction of the statute. *Chevron v. NRDC*, 467 U.S. 837, 842-43 (1984). Here the Corps has ruled that deep plowing is a "discharge" subject to section 404 jurisdiction. The Ninth Circuit upheld this interpretation. However, this conclusion is not supported by the plain language of the statute, its legislative history, or the principles of soil mechanics.

"[T]he starting point for interpreting a statute is the language of the statute itself." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 56 (1987). For plowing to be controlled by Section 404, it must involve the

"discharge of dredged or fill material into the navigable waters[6] . . . ." 33 U.S.C. § 1344(a) (footnote added). This is a specific requirement derived from Section 301(a) of the Act which prohibits the "discharge of any pollutant" unless in compliance with the permit (e.g., Section 404) requirements of the Act. 33 U.S.C. § 1311(a). The term "pollutant" (33 U.S.C. § 1362(6))

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[6] The Clean Water Act defines navigable waters only as "the waters of the United States, including the territorial seas," § 1362(7). This Court in *SWANCC*, 531 U.S. 159, addressed whether the Corps' definition of "waters of the United States" in 33 C.F.R. § 323.2(a)(5) (1978), was what Congress intended. This Court found that the regulation read the term "navigable" out of the definition by expanding "waters of the United States" to include "isolated wetlands" and later, "intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters of the United States, the degradation of which could affect interstate commerce." 33 C.F.R. § 323.2(a)(5). This Court earlier found section 404 jurisdiction over nonnavigable wetlands located *directly adjacent* to open waters, *United States v. Riverside Bayview Homes*, 474 U.S. 121, 134 (1985), but in *SWANCC* the Court refused to expand jurisdiction per the Corps' regulation to "isolated wetlands" not adjacent to open water bodies. To do so would make a nullity of the word "navigable" as used in the Clean Water Act. *SWANCC*, 531 U.S. at 172.

While this Court did not address jurisdiction over the types of "wetlands" now involved in this case, Amici strongly believe that this Court's reasoning in *SWANCC* should also bring into question the Corps' Section 404 jurisdiction over the "widely dispersed seasonal drainage swales and intermittent drainages" on the "semi-arid Borden Ranch." Pet. at 6. This Court recognized that Congress may have intended Section 404 to cover only "waters adjacent to 'navigable waters,' such as nonnavigable tributaries and streams." *SWANCC*, 531 U.S. at 171. Borden Ranch did not enter any tributaries or streams but confined its plowing to less than a collective 2 acres of normally dry areas where rainwater collected or flowed downhill. Thus, Amici believe the plowing in this case did not involve <u>any</u> jurisdictional waters of the United States.

can include soil. *United States v. Wilson*, 133 F.3d 251, 259 (4th Cir. 1997), *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 922 (5th Cir. 1983).[7] Thus, soil can be a pollutant and can be "dredged or fill material" subject to Section 404. However, for "plowing" to be controlled by Section 404, it must also involve the "discharge" of the soil (dredged or fill material).

The Act defines the "discharge of a pollutant" as "any **addition** of any pollutant [or pollutants] to navigable waters from any **point source**." 33 U.S.C. § 1362(12) (emphasis added). Accordingly, for plowing to be a discharge, it must "add" "soil" to the "waters" (dry drainage swales) from a "point source" (plow). The clear and plain meaning of these terms shows that plowing fields cannot be a "discharge of a pollutant" as that phrase is defined in the Act.

First, a plow is not a "point source." The Act defines "point source" as any discernable, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. 33 U.S.C. § 1362(14). The legislative history rejects any interpretation that a plow meets this definition. Senator Baker made it quite plain in debate over the conference report that "conferees adopted the Senate amendments to section 404 that clarifies the exclusion of activities that do not involve point source discharges, such as plowing . . . ." *See* Vol. 3, *A Legislative History of the Clean Water Act of 1977*, Serial No. 95-14 (Oct. 1978) (1977 Leg. History) at 524. He

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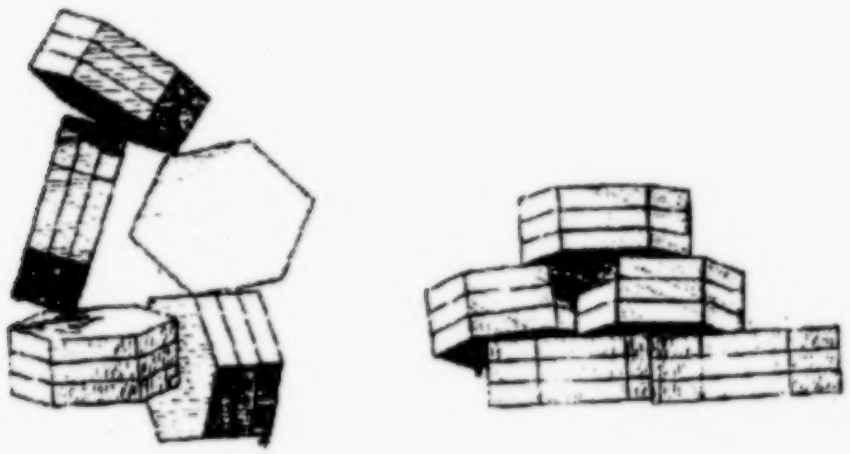
[7] *But see Association to Protect Hammersley, ELD, & Totten Inlets v. Taylor Resources*, No. 00-35667, 2002 U.S. App. LEXIS 15656 (9th Cir. Aug. 6, 2002), which restricts the term "pollutant" to a "waste material of a human or industrial process." *Id.* at *23-*24. Soil used for growing crops is certainly not a waste material.

reiterated this later saying: "The conferees agreed to adopt the approach taken by the Senate in the Senate-passed bill with respect to activities performed by the farming . . . industries. First, the conference bill clarifies the exclusion of activities that do not involve point source discharges of dredged or fill material, such as plowing, seeding, cultivating, harvesting, and upland conservation and minor drainage practices." *Id.* Senator Wallop also expressed the need to protect agriculture from the reach of section 404 explaining that "certain activities that do not involve point source discharge . . . will be adequately controlled by [best] management practices" and that "normal farming [and] ranching . . . activities such as plowing . . . were not intended to require 404 permits." 3 1977 Leg. History at 529.

Moreover, a plow is not a conveyance. The soil is broken and turned in place. It is not carried to another location. As noted by Petitioners, a plow has never been characterized before as a "point source." (Pet. at 20.) The majority decision failed to follow the clear and plain meaning of the statutory terms and instead analogized the plows used by Borden Ranch to bulldozers and backhoes that have been found to constitute point sources when used in a completely different manner to convey soil from one location to another. Specifically, those bulldozers and backhoes had been used for clearing land by moving huge amounts of soil, leveling and filling sloughs, and cutting brush and vegetation at ground level. *See Avoyelles*, 715 F.2d at 923. The bulldozers and backhoes were not used, as was a plow in this case, just to turn over and break up soil. The lower court failed to recognize the essential distinction between machinery used to remove, redistribute, and pile dirt in wetlands and machinery used in this case only to mix and loosen the soil in place. Thus, the plow used by Borden Ranch in this case is not a "point source" subject to section 404 jurisdiction.

Second, Borden Ranch's deep plowing did not cause the addition of a pollutant; rather, deep plowing includes picking up the soil and putting it back in the same place without altering its chemical composition or adding any other material than what was originally there. From the technical perspective, deep plowing is the alteration of the soil's bulk density by reorganizing the soil particles to allow more air into the soil. This is depicted in the following illustration:



In the figure you see an illustration of pore size diversity as the result of the structure formation. The right side of the figure depicts the soil prior to deep plowing and the left side is the soil after deep plowing. Both illustrations contain the same amount of soil "particles," but the figure on the left has more porosity (air space). This addition of air space by reorganizing the soil's most basic building blocks is the result of deep plowing. The soil's particles are rearranged to allow more air to enter the soil and thus affect the soil's bulk density. This decrease in bulk density is what allows the roots of various

crops to grow with fewer impediments.[8] The Corps' conclusion that deep plowing by Borden Ranch was adding a pollutant is not supported by sound soil science. If anything was added, it was air.

Borden Ranch's deep plowing is similar to other soil moving activities that have been found not to add any pollutant to navigable waters. In *National Mining Association v. Army Corps of Engineers*, 145 F.3d 1399, the Corps sought Section 404 jurisdiction over the removal of soil from a wetland area because some of the dirt fell back onto the wetland during removal. The court found that

> the straightforward statutory term "addition" cannot reasonably be said to encompass the situation in which material is removed from the waters of the United States and a small portion of it happens to fall

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[8] *See* McKyes, E., Soil Cutting and Tillage 87-123 (1985) (detailed discussion of soil loosening and manipulation including: measurements of soil loosening, efficiency of soil loosening, soil mixing and inversion, and tool spacing; detailed discussion of soil physical properties and plant growth including: soil compaction, mechanical and hydraulic properties of compacted soil, soil physical properties, and plant growth and tillage of compacted soil). *See also* Becher, H.H., *Penetration Resistance of Pelosol Samples as Affected by Their Moisture Status*, 1 International Soil Tillage Research Organization 97 (8th ed. 1979) (soil penetration resistance high enough to impede root growth can only be reduced by decreasing the bulk density of the soil); Henning, Stanley, J., et al., *Tillage with Tile Drainage in Restored Soil*, 1 International Soil Tillage Research Organization 106 (8th ed. 1979) ("[D]eep tillage may be necessary in replaced soils where compacted horizons hinder root growth and water movement."); and Lovely, W.G., *Overview of Conservation Tillage Systems*, National Conservation Tillage Conference 181 (1973) ("The soil is manipulated to promote movement of air, water, and roots through the soil for better growth of plants and to control runoff erosion." (Citing Free, George & Larson, Bill, *Preparing the Seedbed*, Yearbook of Agriculture (1960))).

> back. Because incidental fallback represents a net withdrawal, not an addition, of material, it cannot be a discharge.

Id. at 1404. Of course, **plowing** also is not an act of discharge or adding pollutants to a wetland. It is an act of reducing soil's bulk density, or "breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops." 33 C.F.R. § 323.4(a)(1)(iii)(D); 40 C.F.R. § 232.3(d)(4) (2002). As with the removal of soil from a wetland, plowing adds nothing to the land. Since no soil is added or removed it does not even involve the "incidental fall back" of soil that is being broken up and turned over.

However, rather than recognize *National Mining Association* as controlling, the Ninth Circuit's decision below instead found this case was governed by two completely inapposite cases, one in the Ninth and one in the Fourth Circuit. *See Borden Ranch Partnership v. Army Corps of Engineers*, 261 F.3d 810, 814 (9th Cir. 2001). In those cases, soils had been removed by buckets from waters and wetlands and then later redeposited into those areas. In *Rybachek v. United States Environmental Protection Agency*, 904 F.2d 1276 (9th Cir. 1990), a placer miner excavated dirt and gravel from a stream bed to an out of stream location, sifted out the gold, and later disposed of the leftover waste material by redepositing it back into the stream. This mining operation has no similarity to the actions of Borden Ranch which did not remove the soil, change its character, and redeposit the spoils. To the contrary, Borden Ranch simply turned the dirt over in place without changing its composition or adding any material to it. As Judge Gould explained in his dissent in this case, deep plowing "does not involve any significant removal or 'addition' of material to the site." *Borden Ranch*, 261 F.3d at 820. Moreover, "[b]ecause deep [plowing] does not move any material to a substantially different geographic location and does not process such

material for any period of time, *Rybacheck* is not controlling." *Id.*

The second case relied on by the majority, *United States v. Deaton*, 209 F.3d 331 (4th Cir. 2000), also involves a totally different activity that includes the removal and redeposit of the soil. In that case, a landowner excavated a drainage ditch in wetlands and sidecast the dredged material onto the wetlands bank alongside the ditch. The court adopted the position that once material is removed from a wetland it becomes a pollutant, and its redeposit becomes an addition of a pollutant subject to Section 404. *Id.* at 335-36. Despite the fact that Borden Ranch neither excavated nor redeposited the soil, the Ninth Circuit majority in this case found deep plowing was analogous to *Deaton*'s sidecasting. *Borden Ranch*, 261 F.3d at 814. Dissenting Judge Gould did not agree and once again found *National Mining Association* was more persuasive stating that "[a] farmer who plows deeply is not, in my view, redepositing dredged or excavated materials." *Id.* at 820.

The reasoning of the Ninth Circuit and the Corps of Engineers squarely conflicts with basic soils dynamics and the correct analytical approach of the D.C. Circuit in *National Mining Association.* Deep plowing normally dry, seasonally wet ranch land does **not add** a pollutant to the nation's waters subjecting it to Section 404 regulation.

II

THE NINTH CIRCUIT'S DECISION IGNORED AN ADAMANT CONGRESSIONAL COMMAND THAT PLOWING RANCH AND FARM LAND IS AN ACTIVITY EXEMPT FROM SECTION 404 REGULATION

The Ninth Circuit ruled that the Corps has Section 404 permitting jurisdiction to regulate Borden Ranch's deep plowing of its seasonally damp ranch land. *Borden Ranch Partnership v. Army Corps of Engineers*, 261 F.3d at 814-16.

It ruled this even though Borden Ranch has a long history of uninterrupted agricultural use in these areas of the ranch and even though its deep plowing was done solely to improve agricultural operations by introducing different food crops that require more porous soil. The Ninth Circuit's legal conclusion flies in the face of congressional intent and if not overturned can result in serious economic injuries to California's farmers and ranchers.

A. California Farmers and Ranchers Depend on the Normal Farming and Ranching Activity of Deep Plowing

California agriculture has a tremendous impact on the lives of individuals throughout the world. It is home to eight of the top ten United States farm counties[9] and in every single one of them deep plowing is a long practiced, normal farming activity.[10] California's top four farm exports—almonds, wine, cotton, and table grapes[11]—all require deep plowing prior to

[9] United States Department of Agriculture, National Agricultural Service, 1997 Census of Agriculture, AC 97-S-2, *Ranking of States and Counties*, 27, Vol. 2, Subject Series Part 2.

[10] Interview with Hal Collin, President of Agri-Struction (Mar. 15, 2002), a family-owned agricultural land improvement company in business since 1934. Deep plowing allows for better water penetration which in turn allows the roots of the crop to grow deeper. This provides for more stability in tree and vine crops. It also results in better yields, better quality, more efficient use of the water applied to the crop, recharging the ground water, and more efficient utilization of fertilizers and agricultural chemicals that are applied to the crop. *Id.* *See also* University of California Cooperative Extension, *Managing and Modifying Problem Soils* 4-6 (1974).

[11] California Department of Food and Agriculture, *Agricultural Resource Directory 2001* 34 (2001).

planting.[12] Besides producing all of the nation's almonds, California is the nation's sole producer (99% or more) of figs, kiwi fruit, olives, persimmons, pistachios, prunes, raisins, and walnuts,[13] each of which also often requires deep plowing prior to planting particularly in areas like California's Central Valley that contain clay soils.[14] Nectarines, peaches, plums, oranges, apples, pears, gueros and jalapeno chili peppers, lettuce, all nut crops, loose leaf lettuce, and alfalfa often require deep plowing too.[15]

Deep plowing occurs where a crop needs irrigation water to penetrate through the soil, but the soil is too highly

[12] *See* University of California Cooperative Extension, *Sample Costs to Establish an Almond Orchard and Produce Almonds* 3 (2001); University of California, Division of Agricultural Sciences, Leaflet No. 2946, *How to Appraise Soil Physical Factors for Irrigated Vineyards* (1977); University of California Cooperative Extension, *California Cotton Review* 5-6 (Sept. 1977).

[13] California Department of Food and Agriculture, *Agricultural Resource Directory 2001* at 33.

[14] Interview with Hal Collin, President of Agri-Struction (Mar. 15, 2002). *See also* University of California Cooperative Extension, *Sample Costs to Establish a Manzanillo Olive Orchard and Produce Olives* 4 (1997); University of California Cooperative Extension, *Sample Costs to Establish a Prune Orchard and Produce Prunes* 4 (1997); University of California Cooperative Extension, *Sample Costs to Establish a Fig Orchard and Produce Figs* 4 (1994).

[15] *See* University of California Cooperative Extension, *Sample Costs to Establish an Orange Orchard and Produce Oranges* 4 (1999); University of California Cooperative Extension, *Sample Costs to Establish a Pecan Orchard and Produce Pecans* 4 (1998); University of California Cooperative Extension, *Production Practices and Sample Costs to Produce Loose Leaf Lettuce* 3 (1996); University of California Cooperative Extension, *Sample Costs to Establish an Apple Orchard and Produce Apples* 3 (1994).

compacted to allow the water to reach the roots of the crop. California's farming families often need to plow deeply to convert land from less productive agriculture, such as raising forage, to more productive agriculture, such as orchards, vineyards, alfalfa, and certain vegetable crops. This kind of plowing is done at depths greater than 16 inches and can exceed 4 feet.[16] However, under the Ninth Circuit's decision below federal government officials with little or no knowledge of agricultural operations or soil science have the statutory power to remove from these families the critically important decision of which crops to grow and how to manage their agricultural operations.

Ranchers and farmers are faced with formidable pressures to maintain profitability or convert their lands from agriculture to other uses. For instance, between 1964 and 1997, the amount of land used for agriculture in this country dropped about 16% to less than 932 million acres.[17] In California, the most productive agricultural state in the country,[18] agricultural land use dropped by well over 9 million acres during the same period—37 million to 27.7 million acres, a 25% reduction.[19]

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[16] *See* Footnote 3, *infra*.

[17] Kumiroff, Nicolai V., Sumner, Daniel A. & Goldman, George, *The Measure of California Agriculture 2000*, University of California Agricultural Issues Center, November, 2000, at 11.

[18] California Department of Food and Agriculture, *Agricultural Resource Directory 2001* 30.

[19] Over a quarter of California's landmass is used for agriculture (down from over a third as recently as 1964). Just over half of the 27.7 million acres of agricultural land is pasture and range and about 39% is cropland. Most California farms are small in terms of cash receipts and total sales, and are family or (continued...)

Between 1988 and 1998 over 420,240 acres in agricultural production were converted to urban and built up uses.[20] The Central Valley, with about 64% of California's cropland, recorded 44% of statewide cropland conversion out of agriculture between 1988 and 1998. Valley grazing land, about 44% of state total, contributed 27% of total grazing land conversions.[21]

As is evidenced by the facts of this case, decisions imposed under section 404 can have devastating effects on the usability and profitability of agricultural land. The Ninth Circuit's decision ignored the intent of Congress not to impede normal farming activities with the Clean Water Act Section 404 program,[22] and sanctioned new burdens that will force more farm land into nonagricultural uses. For example, if Parkfield, California, rancher and farmer Kevin Kester had been unable to convert 51 acres of his grazing land in 1998 to vineyards, he would have been forced to sell some of his land for nonagricultural uses.[23] The conversion from rangeland to fully planted vineyards enabled Mr. Kester to increase his cash flow to pay estate taxes and avoid the last option of selling off part of his property. However, if Mr. Kester had been subject to the Ninth Circuit's *Borden Ranch* decision, he would not have been

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[19] (...continued)
individually operated. California has a greater share of female farm operators and farms with Hispanic, Asian and Pacific Islander backgrounds than the United States as a whole.

Kumiroff, *et al.*, at 7.

[20] Kumiroff, *et al.*, at 16.

[21] Kumiroff, *et al.*, at 19.

[22] 33 U.S.C. § 1344(f)(1)(A).

[23] Interview of Kevin Kester (Mar. 12, 2002).

able to convert to grapes in a timely manner, if at all. It could have taken well over a year just to get the Section 404 permit needed to make the conversion.[24] Because the *Borden Ranch* decision did not apply to his operation, he was able to act quickly and keep all his acres in agriculture.[25]

This pressure to sell off land is an all too frequent occurrence. Estate taxes, property taxes, market conditions, urban encroachment, changes in water availability, environmental regulation, and a host of tensions work against farming. Farmers must retain flexibility in their operations and an ability to make decisions quickly so they can withstand these difficult financial pressures. Congress recognized the need for flexibility in agricultural operations and excluded normal farming practices from the burdensome permitting requirements of the Clean Water Act. The Ninth Circuit's decision puts the federal government at the controls of the farmer's plow. Unless overturned by this Court, that decision will present another in a long list of adverse financial pressures working against California's family farmers.

B. Congress Did Not Intend to Regulate Plowing as a Discharge Under Section 404

Ranchers and farmers regularly convert from one crop to another as part of normal farming operations. *Supra* at 15-17. Economic exigencies often call for it. Congress knew this and passed the Clean Water Act in 1972 not intending section 404

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[24] One study showed that the average amount of time necessary to obtain a Section 404 permit was 373 days. Goode, Bernard & Albrecht, Virginia, *Wetland Regulation in the Real World*, ALI-ABA Course of Study Materials, Vol. 1 (Feb. 1994).

[25] Farms provide significant open space and ecologically valuable habitat for local flora and fauna. Indeed, 75% of the nation's wildlife lives on farms and ranches. California Farm Bureau Federation, *Facts & Stats About California Agriculture* (2002).

to apply to such normal farming activities. However, the Corps of Engineers did not always observe this intent, nor did the courts. Consequently, after several years watching the courts and Corps of Engineers inconsistently interpreting the law, Congress passed amendments to the Clean Water Act in 1977 to eliminate unequivocally most applications of the section 404 permit program to farming as Congress "emphatically did not want the law to impede these bucolic pursuits," *National Mining Association*, 145 F.3d at 1405.[26] Specifically, section 404(f)(1)(A) was added to expressly eliminate any requirement to obtain a permit for "discharge: (A) from normal farming . . . and ranching activities such as plowing." 33 U.S.C. § 1344(f)(1)(A).

The legislative history of the 1977 Amendments to the Clean Water Act provides a vivid road map of Congress' efforts to clarify what it intended in 1972. Unfortunately, the Ninth Circuit took a wrong turn in its decision below giving this history little notice. Congressman Roberts, one of the key

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[26] As expressed by Senator Muskie in debate over the Senate bill that became the bill adopted in conference as the 1977 amendments to the Clean Water Act:

> The initial response to **section 404** was to interpret it so as to extend its potential jurisdiction over those normal activities which would subject citizens to overregulation, and we all began to get letters protesting that potential intrusion upon their normal activities.
>
> Every proposal before this Senate, every one, is designed to exempt those normal activities from that kind of overregulation by the Corps of Engineers or anybody else. . . .
>
> . . . .
>
> What types of farming and forestry practices are exempt from permit requirements under the committee bill? Let me list them: Normal farming and forestry activities such as plowing . . . .

4 1977 Leg. History at 928.

House managers of the 1977 Act's conference committee, provided a thorough explanation of the new amendments as well as a short history lesson on the implementation problems experienced with section 404 of the 1972 Act.

> In 1972, when Congress passed the comprehensive amendments to the Federal Water Pollution Control Act, it established in **section 404** of that act a new permitting authority for the discharge of dredged or fill materials in navigable waters, superseding the 1899 act for these two activities. The Corps of Engineers, in implementing **section 404**, applied it to the same waters as those over which it exercised jurisdiction under the 1899 act—the navigable waters of the United states. A suit was brought in the U.S. District Court for the District of Columbia alleging that **section 404** was not being interpreted broadly enough and the court agreed, ordering the corps to publish revised regulations correctly interpreting the phrase "navigable waters. *N.R.D.C. v. Calloway* (392 F. Supp. 687 1975)."[27]

3 1977 Leg. History at 351.

As a result of the litigation, the Corps published regulations on July 25, 1975, which were later amended on July 19, 1977. Of particular significance to this case was Congressman Roberts' understanding that these regulations, promulgated to expand the scope of areas and activities subject to section 404, nevertheless "make it clear, as did the 1975 regulations, that plowing, seeding, cultivating, and harvesting

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[27] This Court revisited the term "navigable waters" in *SWANCC*, 531 U.S. 159, finding the regulations the Corps had published pursuant to the NRDC litigation which interpreted the phrase "navigable waters" to include "isolated waters" were unlawful because they read "navigable" right out of the definition.

for the production of food, fiber, and forest products are not included in the **section 404** program." *Id.* Yet Congress was concerned after the NRDC litigation that the 404 program could be interpreted by the courts to apply to normal farming since it was not expressly stated to the contrary in the 1972 Act.[28]

Congressman Roberts went on to explain that the 1977 Amendments were designed to obviate that concern by creating express exemptions for normal farming activities like plowing. As announced by the Congressman, "we will now have for the first time statutory recognition that normal farming, ranching and silviculture activities do not belong in this permit program. These exemptions reemphasize that Congress never intended these activities to be considered discharges of dredged or fill material." 3 1977 Leg. History at 351.[29]

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[28] Conference Report manager, Senator Jennings Randolph explained:

> One of the most controversial of [the issues in the 1977 Amendments to the Act] relates to the regulation of disposal of dredge and fill material, resulting from a judicial decision as to the authority and responsibility of the Army Corps of Engineers under section 404 of the 1972 act. That decision resulted in widespread concern that many activities usually considered routine would be prohibited or made extremely difficult because of the complex regulatory procedure set up by the corps unless there was a new statement of congressional intent.

3 1977 Leg. History at 494.

[29] Congressman Stump explained that "[t]he conferees have clarified that plowing . . . [was] not intended to require Section 404 permits." 3 1977 Leg. History at 420. Later in debate, Senator Stafford further clarified the conference report explaining that

> the bill includes the clarification that permits are not required for certain normal farming activities such as plowing and seeding which are not discharges of dredged or fill material.

(continued...)

Senator Muskie, in presenting the conference report to the Senate, could not have made the point any more cogently stating: "The conferees have adopted the Senate's explicit approach for clarifying that plowing, seeding, cultivating, harvesting . . . were not intended to require section 404 permits. Such exemptions were provided by the Corps of Engineers' regulations under the current law." 3 1977 Leg. History at 474. Specifically, plowing was not intended to require section 404 permits, and the exemptions in the bill were explained as emulating what was already found in the Corps' own regulations which expressly "make it clear that . . . plowing . . . for the production of food . . . products [is] not included in the section 404 program." 3 1977 Leg. History at 348.[30]

As vigorously and repetitiously explained in the legislative history of the 1977 Clean Water Act Amendments, Section 404 was amended to allow, *without a permit*, normal farming and ranching activities such as plowing, seeding, cultivating, and harvesting for the production of food and fiber. 33 U.S.C. § 1344(f)(1)(A).[31]

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[29] (...continued)
3 1977 Leg. History at 485. He also explained that other farming activity that would "connect water to dry land including, for example, those occasional farm or forestry activities that involve dikes, levees or other fills in wetland or other waters," *activities unlike plowing*, would still require a permit. *Id.*

[30] Senator Wallop explained that section 404 as amended would relieve agriculture "of irrelevant or unnecessary burdens," referring to a farmer not having to obtain a 404 permit to plow his fields. 3 1977 Leg. History at 530, 533.

[31] Of particular importance to agriculture in California, this subsection does not limit itself to certain types of plowing. In fact, the government has never recognized any such limitations, or degrees of plowing in its own regulations. *See* 33 C.F.R. § 323.2(f); 40

(continued...)

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[31] (...continued)
C.F.R. § 232.3(c)(1)(i). When defining what the term "discharge of fill material" means, the Corps of Engineers categorically states that "the term does not include plowing." 33 C.F.R. § 323.2(e). EPA's regulatory definition for plowing, 40 C.F.R. § 232.3(D)(4), expresses the same conclusion:

> Plowing means all forms of primary tillage, including moldboard, chisel, or wide-blade plowing, discing, harrowing, and similar physical means used on farm, forest or ranch land for the breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops . . . . Plowing, as described above, will never involve a discharge of dredged or fill material.

Thus, all plowing, including deep plowing, must be a normal farming activity within the meaning of Section 404(f)(1)(A), or it *would not* be expressly excluded from the meaning of "discharge of dredged or fill material" by the Corps' and EPA's own regulations.

However, the Corps unilaterally decided in a December 12, 1996, joint Corps/EPA memorandum to the Field, without formal rule making, that the deep plowing needed to prepare compacted soil for vineyards or orchards does not constitute a "normal farming" activity. (*See* Petitioner's Appendix at 4, 199-207; RGL 96-02.) This interpretation is not entitled to serious deference however as it is not the result of "a formal adjudication or notice-and-comment rulemaking," *Christiensen v. Harris County*, 529 U.S. 576, 587 (2000). *But see United States v. Mead Corp.*, 533 U.S. 218, 230-31 (2001). Moreover, the Corps' new informal interpretation is not of long duration and is not even internally consistent as it contradicts a previous Corps' interpretation which came to the exact opposite conclusion. *See* RGL 86-01, lodged with the Court by Petitioners, which stated that any plowing for the production of a crop [vineyards and orchards] is not a discharge and is not even subject to section 404(f) exemptions. *See also General Electric Co. v. Gilbert*, 429 U.S. 125, 142 (1976) (discounting significance of agency interpretive guideline promulgated eight years after statute's enactment, although

(continued...)

C. The Ninth Circuit's Reliance on *Akers* Was Misplaced

Congress expressly established section 404 permitting exemptions for plowing in 33 U.S.C. § 1344(f)(1)(A). That section exempts any "discharge: (A) from *normal farming*, . . . and *ranching activities such as plowing*." In total disdain for congressional will expressed in the 1977 amendments to the Clean Water Act and their legislative history, the decision below ruled that even if the deep plowing were exempt, subsection (f)(2) provides an exception to any plowing exemptions that could be applied to Borden Ranch. *Borden Ranch*, 261 F.3d at 815. Subsection (f)(2) is known as the recapture provision. It states:

> Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

33 U.S.C. § 1344(f)(2).

The Ninth Circuit interpreted this subsection to negate the subsection (f)(1) plowing exemption if a farmer is changing his crop, for example, from seasonal hay or pasture grass to orchards or vineyards and the plowing causes "substantial hydrological alterations." *Borden Ranch*, 261 F.3d at 815-16 (citing *United States v. Akers*, 785 F.2d 814, 820 (9th Cir. 1986)).[32] But the *Akers* decision did not hold that plowing solely done for the purpose of changing crops for the production of food constituted "bringing an area [of the farm] into a use to which it was not previously subject." *Akers* did not deal with plowing. It addressed the conversion of part of the farm known as the Big Swamp to uplands by massive dike building, grading, leveling, and water diversion activities. *Akers*, 785 F.2d at 816. *Akers* dealt with land conversion activities that truly sought to turn land "into a use to which it was not previously subject." 33 U.S.C. § 1344(f)(2).

The Ninth Circuit dismissed this distinction and gave little credence to the strong legislative history that repeatedly emphasized the importance of this distinction to ensure that normal farming activities like plowing for the production of food would not be subject to section 404. *See infra* at 22. Instead, the lower court decided that under section 404 the federal government could control what is grown on compacted farm land like that found on Borden Ranch.[33] As this Court

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[31] (...continued)
fact that guideline contradicted agency's earlier position deemed "more importan[t]").

[32] Senator Muskie contradicted the court's conclusion that the Corps could dictate what crops a farmer plants if the new crops required better draining soils. He stated specifically in response to concerns from fellow Senators that farmers might not be able to change crops under the amended law without a Corps permit, that "if the drainage is being constructed in a field already in agricultural use for crops such as soybeans or corn, the drainage activity would not be subject to any permit under the provisions of the committee bill." 4 1977 Leg. History at 928.

[33] The application of Section 404 is limited by its express terms to "navigable waters." Under *SWANCC*, 531 U.S. 159, waters of the United States subject to Section 404 jurisdiction include wetlands adjacent to traditional navigable waters, possibly including adjacent nonnavigable tributaries and streams. *Id.* at 172. However, it is undisputed that Borden Ranch did not conduct plowing activities in wetlands adjacent to either traditional navigable waters or (continued...)

recognized in *SWANCC*, in addressing the jurisdictional scope of the Section 404 program, "[r]ather than expressing a desire to readjust the federal-state balance in this manner, Congress chose to 'recognize, preserve and protect the primary responsibilities and rights of states . . . to plan the development and use . . . of [their] land and water resources' . . . 33 U.S.C. § 1251(b)." *SWANCC*, 531 U.S. at 174. The Ninth Circuit ignored this principle and as a consequence threatens the livelihood of scores of family farmers in California as well as across the nation.

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[33] (...continued)
nonnavigable tributaries or streams. It was charged instead with plowing heavily compacted soils in certain isolated seasonal drainage swales. But, as indicated in *Rice v. Harken Exploration Co.*, 250 F.3d 264, 271 (5th Cir. 2001), it would be an unwarranted expansion of the Clean Water Act to find that a discharge onto land that only infrequently carries running water is a discharge into navigable waters. The Ninth Circuit's decision below sanctioned just such an expansion. *See also United States v. Newdunn Associates*, 195 F. Supp. 2d 751, 765-66 (E.D. Va. 2002) (no Section 404 jurisdiction over surface water that drains into a series of ditches that drain into navigable water body); *United States v. Rapanos*, 190 F. Supp. 2d 1011, 1015 (E.D. Mich. S.D. 2002) (no Section 404 jurisdiction over wetlands draining into nonnavigable creeks that drain into navigable water body over 20 miles away).

CONCLUSION

For the foregoing reasons, Amici respectfully submit that because plowing does not cause the "discharge of a pollutant," it is not subject to section 404 permitting jurisdiction. The decision of the court below should be REVERSED.

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